86 1570

No. _____

SUPREME COURT, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE McKINLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

James K. Jenkins
Maloy, Sadow & Jenkins
800 Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-9400

Counsel of Record

QUESTION PRESENTED FOR REVIEW

Was the criminal prosecution of Petitioner barred by the applicable statute of limitations because:

(a) the statute of limitations expired during the 16 month period the indictment was sealed under Rule 6(e)(4), F.R.Crim.P.; and

(b) the Government failed to make a good faith effort to locate any of the defendants during the period the indictment was sealed; and

(c) the Government willfully caused the sealing to continue without any notice to the sealing court for nearly seven months after the location of the defendant whose arrest the sealing was intended to insure?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....2

JURISDICTION.....2

STATUTE AND RULE INVOLVED.....3

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....10

CONCLUSION.....25

APPENDIX.....1a

TABLE OF AUTHORITIES

Cases Page

Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).....17

In re Clyne, 35 Pac. 23, 52 Kan. 441 (Kan. 1893).....19

In re Griffith, 11 Pac. 174, 38 Kan. 377 (Kan. 1886).....19

Johnston v. Standard Mining Company, 148 U.S. 360, 13 S.Ct. 583 (1893)....19

People v. Clement, 40 N.W. 190, 72 Mich. 116 (Mich. 1888).....19

Simon v. Moseley, 452 F.2d 306 - (11th Cir. 1971).....19

Toussie v. United States, 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed. 2d 156 (1970).....16

United States v. Dennard, 722 F.2d 1510 (11th Cir. 1984).....14

United States v. Edwards, 777 F.2d 644 (11th Cir. 1985).....13, 14, 15, 23

United States v. Grady, 544 F.2d 598 (2d Cir. 1976).....12

United States v. Gernie, 228 F.Supp. 329 (S.D.N.Y. 1964).....20

United States v. Hill, 719 F.2d 1402 (9th Cir. 1983).....20

United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).....19

United States v. Michael, 180 F.2d 55 (3d Cir. 1949).....12

United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985).....8, 14, 18

United States v. Muse, 633 F.2d 1041 (2d Cir. 1980).....13

United States v. Paden, 558 F.Supp. 636 (D.C. 1983).....20

United States v. Ramey, 791 F.2d 317 (4th Cir. 1986).....13, 14

United States v. Southland Corp., 760 F.2d 1366 (2d Cir. 1985) 12, 13, 14, 15, 23

United States v. Watson, 599 F.2d 1149 (2d Cir. 1979).....15

Statutes

18 U.S.C. §3182.....3, 16

Federal Rules of Criminal Procedure

Rule 6(e)(4), F.R.Crim.P....4, 5, 10, 12, 15, 20, 22, 23, 24

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE McKINLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner Lawrence McKinley respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on December 9, 1986, rehearing denied January 28, 1987.

OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit affirmed Petitioner's conviction without opinion, pursuant to Rule 25, Rules of the United States Court of Appeals for the Eleventh Circuit. This opinion is reprinted in the appendix hereto, p. 1a, infra. Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals for the Eleventh Circuit in an order reprinted in the appendix hereto, p. 2a, infra.

The memorandum decision of the United States District Court for the Northern District of Georgia (Tidwell, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 4a, infra.

JURISDICTION

Petitioner's conviction was affirmed by the United States Court of Appeals for the Eleventh Circuit on December 9, 1986,

with timely Petition for Rehearing and Suggestion for Rehearing En Banc being denied on January 28, 1987.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

18 U.S.C. § 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Rule 6, F.R.Crim.P.

(e)(4) Sealed Indictments.

The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

STATEMENT OF THE CASE

On October 19, 1982, a federal grand jury in Georgia returned an indictment charging Petitioner McKinley and six co-defendants with various marijuana related offenses occurring from October 1977 to September 1978 (R. Vol. 1). The appropriate praecipae and arrest warrants were issued on October 20, 1982 (Supp.R.

Vol. 1). The Government appeared before a United States Magistrate and informed the court that the lead defendant, Mitchell, had access to large sums of money and that Mitchell had indicated a propensity to flee. The magistrate granted the Government's request to seal the indictment pursuant to Rule 6(e)(4), F.R.Crim.P. (Supp.R. Vol. 3, p. 192; Supp.R. Vol.2).

On July 12, 1983, on the basis of information provided by the DEA agent in charge of the instant case, defendant Mitchell was arrested at his home in Alabama on a federal warrant for an unrelated indictment. One of the arresting officers was the IRS agent in charge of the tax aspect of the instant case, which resulted in the indictment here in question. Even though the DEA forms filled out at Mitchell's arrest listed the file title and number in the

instant case, the agents did not execute the outstanding arrest warrant on Mitchell because they had been instructed not to do so by a Government attorney. The magistrate who had sealed the instant indictment was not informed of Mitchell's arrest (Supp.R. Vol. 4, pp. 87-88, 130, 142-143, 196; Supp.R. Vol. 3, pp. 90-91). As a consequence, the indictment continued to remain sealed for nearly seven additional months (during which the statute of limitations expired), until Mitchell and four other defendants, having heard rumors of the indictment, surrendered themselves to the United States Marshal in Atlanta, Georgia in February, 1984. Only this unexpected mass surrender of defendants forced the unsealing (R. Vol. 1). Petitioner McKinley, who was then employed as the captain of a merchant ship in the Caribbean, and was not in touch with his

co-defendants, was not arrested. Even after the unsealing, no effort was made to notify Customs or other authorities of the arrest warrant which would have resulted in his arrest when he entered the United States, as he did on several occasions during the time the indictment remained sealed (R. Vol. 2-20-33; R. Vol. 4, pp. 37-38; Supp.R. Vol. 4, pp. 87-88, 142-143, 1966).

After extensive pretrial hearings as to the five original defendants, the district court entered an order dismissing all of the marijuana related counts, based on its conclusion that:

". . . the record indicates that the Government did not engage in a good faith investigative effort to find the defendants during the period from October, 1982 until January 1984." (Supp.R. Vol. 1).

The Government appealed this order to the United States Court of Appeals for

the Eleventh Circuit, which reversed. United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985), cert. denied, 106 S.Ct. 819 (1986).

During the pendancy of the Mitchell appeal in the Eleventh Circuit, Petitioner McKinley was arrested in Florida on the basis of unsolicited information from an estranged girlfriend. Petitioner moved to dismiss the indictment, based on the expiration of the statute of limitations and his Sixth Amendment right to speedy trial. The Mitchell record was adopted by stipulation of counsel and hearings were held on his separate motion (R. Vols. 2-5). Petitioner's motion was denied, based on the district court's conclusion that the intervening decision in Mitchell, supra, required the defendant to show "substantial, irreparable, actual prejudice." Appendix, p. 6a, infra. Under that standard, despite the

trial court's finding that the "question [of actual prejudice] was a close one" due to the destruction of Petitioner's business records during the period the indictment remained sealed, the court denied Petitioner's motion to dismiss. Id., pp. 11a-12a.

Petitioner proceeded to trial alone. All of the other defendants, with the exception of Mitchell, pled guilty and were sentenced to probation. Mitchell was tried separately on the tax-related charges and acquitted; his marijuana related charges were dismissed on the grounds of collateral estoppel. At Petitioner's trial, the court granted his motion for judgement of acquittal as to three counts; the jury returned a verdict of not guilty as to two counts, and found him guilty as to two counts. Petitioner was sentenced to a total of three years imprisonment, ten years special parole,

and five years probation (R. Vol. 1).

On appeal to the Eleventh Circuit, Petitioner's conviction was affirmed without opinion on December 9, 1986. Appendix, p. 1a, infra. On January 28, 1987, the Petition for Rehearing and Suggestion for Rehearing En Banc was denied. Appendix, p. 2a, infra.

REASONS FOR GRANTING THE WRIT

This case presents the important issue of the necessity to insure the existence of judicial supervision over the sealing of indictments pursuant to Rule 6(e)(4), F.R.Crim.P. where the sealing extends past the applicable statute of limitations. The standard evolving in the Circuit Courts of Appeal has created a situation where there is now no meaningful requirement that the sealing period be used to fulfill its stated purpose, and no real limits on the

duration of the sealing period. The effect of this is an abdication of this judicial function to the prosecuting attorney. Moreover, all actions of the prosecuting attorney have been effectively insulated from appellate review by requiring an aggreived defendant to make an all but impossible showing of substantial, irreparable, actual prejudice. The end result is, as in Petitioner's case, the complete evisceration of the protection against stale prosecutions historically afforded by the statute of limitations and the deprivation of any redress for even the most willful violation of any court's sealing order under Rule 6(e)(4).

With the ever-increasing frequency of complex prosecutions being brought on the very brink of the running of the statute of limitations, and not revealed or tried until years past its expiration, the

instant Petition encompasses an issue as to which this Court has never spoken, and where its guidance is greatly needed.

"There is a surprising dearth of authority upon the subject [of Rule 6(e)(4)]." United States v. Southland Corp., 760 F.2d 1366, 1379 (2d Cir. 1985). Existing authority agrees that when an indictment is returned within the time allowed under the applicable statute of limitations, 18 U.S.C. § 3282, it is timely. This timely filing tolls the statute of limitations. United States v. Grady, 544 F.2d 598, 601 (2d Cir. 1976). The Government may properly request the sealing of an indictment pursuant to Rule 6(e)(4), F.R.Crim.P., even though that period may extend beyond the statutory period. United States v. Michael, 180 F.2d 55 (3d Cir. 1949). An indictment sealed under this rule is timely even though the defendant is not arrested and

the indictment unsealed until after the expiration of the statutory period. United States v. Muse, 633 F.2d 1041 (2d Cir. 1980)(en banc); United States v. Southland Corp., supra; United States v. Edwards, 777 F.2d 644 (11th Cir. 1985); and United States v. Ramey, 791 F.2d 317 (4th Cir. 1986).

The standard that has evolved permits the sealing of an indictment for "any legitimate prosecutorial need . . ." Ramey, supra at 321; or "[W]here the public interest requires it, or for other sufficient reason" or "for sound reasons of policy." Southland, supra at 1379, 1380. See also Edwards, supra at 648.

Further, the decision of the magistrate in granting the sealing is entitled to "great deference," since the Government should be able, "except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an

indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when re-indictment is by hypothesis impossible." Southland, supra at 1380. Edwards, supra at 648-649.

As a corrollary, or perhaps as a product of this concern, the courts which have addressed the question of an indictment maintained under seal beyond the limitation period have required a defendant to show "substantial, irreparable and actual prejudice." Edwards, supra at 649; United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985); Ramey, supra at 322; United States v. Dennard, 722 F.2d 1510, 1513-14 (11th Cir. 1984).

Despite the stringency of the showing presently required to obtain redress for any harm occasioned by the sealing of an

indictment or any violations of Rule 6(e)(4), two essential protections remain encompassed by the procedures governing the sealing. These are, of course, in addition to the requirement that the sealing be to fulfill a legitimate prosecutorial need. First, as Circuit Judge Friendly noted in Southland, supra at 1380: "The limiting effect of the Rule [6(e)(4)] was to place sealing in the hands of a judicial officer rather than as theretofore in those of a prosecutor [citation omitted]." Second, the Government may not request the sealing of an indictment for more than a reasonable time after the statute of limitations has expired. Edwards, supra; United States v. Watson, 599 F.2d 1149, 1155 (2d Cir. 1979), modified sub nom. United States v. Muse, supra.

Petitioner submits that these essential limitations, however, have been

rendered meaningless by the application of the substantial, irreparable and actual prejudice standard for relief. In doing so, the protections afforded by the statute of limitations, 18 U.S.C. §3282, preventing the Government from instituting prosecutions after excessively long delays, and thus prejudicing the defendant by increasing his difficulty in marshalling evidence, Toussie v. United States, 397 U.S. 112, 114-15, 90 S.Ct. 858, 859-60, 25 L.Ed. 2d 156 (1970), have been destroyed.

Actual prejudice, especially in the context of a case that is legally presumed stale is, at best, difficult to prove. As Mr. Justice Powell has stated:

> If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant

> past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).

The virtual impossibility of proving actual prejudice is borne out in the instant record. Petitioner's memory, as well as certain business records which would have either refreshed his memory or proved his whereabouts in 1977-1978 had been destroyed during the period his indictment was sealed. Yet the district court ruled against Petitioner's proof of actual prejudice, concluding that although the question was a "close one", Petitioner had been impeached on a collateral point, and had therefore not met his burden. Appendix, pp. 11a-12a, infra.

This burden of proof is the origination of what is now an open field for prosecutorial exploitation that is not

only beyond meaningful review but, as in the circumstances here presented, constitutes nothing less than the usurpation of the judicial function of supervising the justification and duration of the sealing period.

In the instant case, after hearing evidence as to the Government's efforts to locate the indicted defendants, the district court ruled: ". . . the record indicates that the Government did not engage in a good faith investigative effort to find the defendants during the period of time from October, 1982 until January, 1984." (Supp.R. Vol. 1). This finding was upheld by the Eleventh Circuit. Mitchell, supra at 1547.[1]

---

1. The Mitchell case, as to which Appellant was not a party, was presented and disposed of as a Sixth Amendment speedy trial case. Petitioner presents an independent ground of appeal based on due process and the statute of limitations.

Petitioner submits that the actual prejudice standard should not be used to eliminate the protection of the statute of limitations in such circumstances. United States v. Marion, 404 U.S. 307, 322-323, 92 S.Ct. 455, 30 L.Ed. 2d 468 (1971). A more proper standard is one that would require the moving party to act with diligence in prosecuting an indictment by the prompt service of an outstanding arrest warrant. Marion, id. at fn. 14. See also, 22 C.J.S. Criminal Law § 234, p. 609; Johnston v. Standard Mining Company, 148 U.S. 360, 13 S.Ct. 583 (1893); In re Clyne, 35 Pac. 23, 52 Kan. 441 (Kan. 1893); In re Griffith, 11 Pac. 174, 38 Kan. 377 (Kan. 1886); People v. Clement, 40 N.W. 190, 72 Mich. 116 (Mich. 1888). A similar standard has been applied to the prompt execution of probation and parole violation warrants. Simon v. Moseley, 452 F.2d 306, 309 (11th

Cir. 1971); United States v. Gernie, 228 F.Supp. 329, 337 (S.D.N.Y. 1964); United States v. Hill, 719 F.2d 1402 (9th Cir. 1983); United States v. Paden, 558 F.Supp. 636 (D.C. 1983).

However, under the standard that has evolved in the area of Rule 6(e)(4) sealings requiring a showing of substantial, irreparable, actual prejudice, the due diligence or even good faith of the party who is relying on the exception to the statute of limitations is virtually irrelevant. The effect of this standard in the instant case is to absolve the purposeful failure of the Government to made a good faith effort to even undertake to fulfill the legitimate prosecutorial need represented to the sealing magistrate under oath.

This, however was not the end of the Governmental misuse of the sealing of Petitioner's indictment. The only reason presented to the sealing magistrate was the need to assure the arrest of defendant Mitchell before he could flee (Supp.R. Vol. 2, pp. 3-7). No time limit for the duration of the sealing was specified. In such a case, the only reasonable reading of such a sealing order is to the effect that the indictment could only remain sealed until the legitimate prosecutorial purpose for its sealing was fulfilled -- i.e., the arrest of Mitchell. This was accomplished on July 12, 1983. Yet, despite the participation by federal officers knowledgeable of the existing warrant on the instant charges, Mitchell was neither arrested nor informed of the sealed indictment out of Georgia. Moreover, the DEA case agent in the instant case

testified that a Government attorney on this case told him not to arrest Mitchell on the instant case (Supp.R. Vol. 3, pp. 90-91). Even more significantly, the magistrate who authorized the sealing was not informed of Mitchell's arrest, nor was any authorization for the continued sealing sought or obtained. The result was that the indictment remained sealed for an additional seven months, to be unsealed only after the sua sponte mass surrender of five of the defendants who had apparently heard rumors of the indictment (R. Vol. 1).

The Government, for whatever reason, chose to willfully ignore the judicially authorized justification for the Rule 6(e)(4) sealing -- the arrest of defendant Mitchell before he could flee -- and thereby continued the sealing for an additional, and unnecessary, seven months. All of this was done without

notice to any judicial officer. This is clearly contrary to both of the remaining protections afforded in the area.

First, by its unilateral decision not to arrest Mitchell and unseal the indictment, the Government usurped the judicial role preserved by the express terms of Rule 6(e)(4). See Southland, supra at 1380. Second, by its actions, the Government clearly violated both the implicit terms of the sealing authorization herein and, in so doing, the requirement that the sealing of an indictment past the expiration of the statute of limitations be for no more than a "reasonable" time. Edwards, supra at 647.

Both the judicial oversight required by the provisions of Rule 6(e)(4) and the reasonableness requirement as to the duration of the sealing were clearly and willfully ignored in the instant case.

Yet, the requirement that Petitioner show substantial, irreparable, actual prejudice has denied him relief, even though that question was deemed a "close one" by the district court. The end effect of this requirement which has now been adopted by at least three circuits is to insulate from meaningful redress even the most egregious and intentional disregard for the remaining protections encompassed by Rule 6(e)(4). With this comes the evisceration of the protections afforded by the statute of limitations.

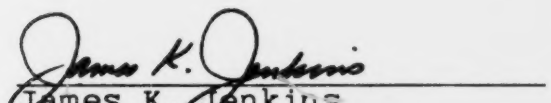
The lack of guidance from this Court in this area has had and will continue to have a telling effect on the use and administration of the Rule 6(e)(4) exception to the heretofore absolute bar of the statute of limitations. The actual prejudice requirement deserves careful consideration lest it continue to insulate and absolve all misuse and

misconduct committed in this area. In the alternative, specific provisions requiring periodic judicial review of the continued need for the sealing (e.g., every 60 or 90 days) should be created to insure that both the protection of the judicial oversight and the reasonableness of duration requirement will be enforced in a meaningful fashion. To do otherwise is to carve out a virtually unsupervised, unreviewable exception to the statute of limitations, and to abdicate the administration of this vital and historic protection to the party whose actions it was created to restrain.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for certiorari should be granted.

Respectfully submitted,



James K. Jenkins
Maloy, Sadow & Jenkins
800 Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-9400

Counsel of Record

March 29, 1987

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-8207
Non-Argument Calendar*

D.C. Docket No. 82-404

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAWRENCE McKINLEY,
Defendant-Appellant.

Appeal from
the United States District Court
for the Northern District of Georgia

(December 9, 1986)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

---

*Fed.R.App.P. 34(a); 11th Cir. R. 23.

Judgement Entered: December 9, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8207

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAWRENCE McKINLEY,
Defendant-Appellant.

Appeal from
the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion December 9, 11 Cir., 1986,
____F.2d____).(January 28, 1987)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:
(x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) the Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for rehearing en banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of the cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

REHG-6
(Rev. 6/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	
V.	)	CRIMINAL NO.
	)	CR82-404A-2
LARRY McKINLEY	)	

ORDER

The above-styled matter is presently before the court on defendant Larry McKinley's motion to dismiss the indictment. The essential background facts of this action are set forth in United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985), and will be repeated only inasmuch as they impact on the present motion.

On June 8, 1984, this court previously granted defendant's motion to dismiss the indictment on sixth amendment grounds. See Fed.R.Civ.P. 48(b). The court analyzed the sixth amendment claim using the framework of Barker v. Wingo,

407 U.S. 514, 92 S. Ct. 2182 (1972), as outlined in United States v. Dennard, 722 F.2d 1510 (11th Cir. 1984). The Eleventh Circuit agreed with this court's analysis of the first three Barker factors and the finding that because only two of the first three Barker factors weighed heavily against the government, the defendant was required to show actual prejudice. Mitchell, supra, 769 F.2d at 1547.

The Eleventh Circuit, however, remanded the case, stating that "the defendants must show actual prejudice in order to have the indictment dismissed. That the indictment was sealed beyond the limitations period may figure into the prejudice decision, but that fact alone does not dictate a finding of prejudice." Id. at 1548. This burden upon defendant was reaffirmed in United States v. Edwards, 777 F.2d 644 (11th

Cir. 1985), in which the Circuit reiterated that an indictment maintained under seal beyond the limitation period could be dismissed "only upon a showing of substantial, irreparable, actual prejudice to the defendants." Id. at 649.

Mr. McKinley in his present motion to dismiss attempts to meet his burden and demonstrate that he has been prejudiced by the sealing of the indictment in two distinct manners.

First, defendant contends that he has been prejudiced by the loss of the testimony of Mr. Al Horn. Mr. Horn died after the indictment was unsealed but prior to trial. At least one Circuit has indicated that in order to dismiss the indictment, the prejudice to the defendant must occur during the time that the indictment is sealed. United States v. Muse, 633 F.2d 1041, 1042 (2d Cir. 1980), cert. denied 450 U.S. 984 (1981).

In a hearing on this matter, defendant indicated that Mr. Horn, had he been available, would have primarily testified on a collateral issue. Further, had the issue of Mr. Horn's purported testimony come up during trial, the court could have made some accommodation to protect defendant or make Mr. Horn's position known to the jury. At the hearing on the motion to dismiss there were discussions about whether Mr. Horn's testimony would even be necessary if the government presented its case in a certain manner. As a matter of record, the issue did not come up at trial and the "need" for Mr. Horn's testimony became moot.

The court concludes that the loss of Mr. Horn's live testimony does not establish actual prejudice under the Barker and Dennard tests.

Defendant's other and more substantial argument for actual prejudice focuses on the claim of lost records of the dissolved corporation, Atlantic Southeastern Company, Inc. (Atlantic). Atlantic was a corporation alleged to have been primarily run by Mr. McKinley's brother and not the defendant. Although there are records that indicate that the defendant, Lawrence McKinley, was the President of this company, see, e.g., Government's exhibit 20 (evidentiary hearing before Magistrate Dougherty on July 8, 1985); Defendant's exhibit 1 (hearing before Judge Tidwell on January 15, 1986), he testified that he was only the Vice President.

Atlantic dissolved in September 1982. Defendant McKinley testified that he destroyed all the records of Atlantic sometime in early 1983 during the period that the indictment was sealed. The

defendant asserts that these records contained documents such as purchases for the corporation, deposits slips, and airline and hotel reservations, whether made on behalf of the corporation or for his own use. The defendant argues that he cannot remember exactly where he was during the dates of the indictment, but asserts that these destroyed records would have demonstrated that he was at a different location than specified in the indictment. The records would also allegedly prove that Mr. Mitchell was not an owner of Atlantic and thus refute other of the government's contentions.

The fact that the defendant has memory lapses does not in and of itself establish prejudice. See Dennard, supra at 1513-14. The claimed loss of physical evidence, though, is a more difficult question. Whether the destroyed

documents could have, in fact, demonstrated that defendant McKinley was somewhere other than where the indictment locates him is unknown. The need and the extent to which these documents would have been helpful to the defendant is highly questionable. The answers to the questions of whether the alleged documents would have even contained all the type of information and receipts claimed to have been included, and whether these documents would not have been destroyed if the indictment had remained unsealed, largely turns upon the credibility of defendant McKinley. Although some "undestroyed documents" have been uncovered, there are no tax returns or credit card statements or other items that might independently corroborate all the claimed activity performed by Mr. McKinley during the time period. The same is true for the issue of Mr. Mitchell's lack of

involvement with Atlantic, which the court notes, did not arise during trial.

The question is a close one. However, the government has successfully impeached the defendant on a handwriting sampler after the defendant denied writing certain documents. Considering the impeachment as to that issue and after weighing all the evidence, the court concludes that defendant's credibility has been placed in substantial doubt and that defendant has not sufficiently satisfied his burden of showing "substantial, irreparable, actual prejudice" because of the sealing of the indictment.

Defendant McKinley's motion to dismiss is denied.

SO ORDERED, this 19 day of February, 1986.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

(2)

No. 86-1570

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

LAWRENCE MCKINLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTION PRESENTED

Whether petitioner's prosecution was barred by the statute of limitations, which expired while his indictment was under seal.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *Edwards*, 777 F.2d 644, (11th Cir. 1985), cert. denied, No. 85-1562 (Apr. 21, 1986)	6, 7
United States v. *Mitchell*, 769 F.2d 1544 (11th Cir. 1985), certs. denied, No. 85-5746 (Jan 13, 1986) and No. 85-6106 (Feb. 24, 1986)	2, 3
United States v. *Muse*, 633 F.2d 1041 (2d Cir. 1980), cert. denied, 450 U.S. 984 (1981)	7
United States v. *Ramey*, 791 F.2d 317 (4th Cir. 1986)	6, 7
United States v. *Southland Corp.*, 760 F.2d 1366 (2d Cir. 1985), cert. denied, No. 84-1951 (Oct. 7, 1985)	7
United States v. *Srulowitz*, No. 86-1446 (2d Cir. May 15, 1987)	7

Statutes and rule:

21 U.S.C. 841(a)(1)	1
21 U.S.C. 846	2
Fed. R. Crim. P. 6(e)(4)	2, 6

Miscellaneous:

8 J. Moore, *Moore's Federal Practice* (2d ed. 1987)	7
1 C. Wright, *Federal Practice and Procedure* (2d ed. 1982)	7

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1570

LAWRENCE MCKINLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a) is reported at 808 F.2d 60.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1986. A petition for rehearing was denied on January 28, 1987 (Pet. App. 2a-3a). The petition for a writ of certiorari was filed on March 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 5), and conspiring to distribute and possess with intent to distribute

marijuana, in violation of 21 U.S.C. 846 (Count 3).[1] He was sentenced to three years' imprisonment on Count 5, to be followed by a ten-year special parole term, and to five years' probation on Count 3.

1. The original seven-count indictment in this case was returned in October 1982. Petitioner was one of seven defendants charged with various marijuana-related offenses.[2] At the time the indictment was filed, the prosecutor appeared before a magistrate and requested that the indictment be sealed pursuant to Fed. R. Crim. P. 6(e)(4). He represented that the drug transactions at issue involved millions of dollars and that defendant Mitchell had access to large sums of money both in this country and abroad and that he might flee if he learned of the indictment. The magistrate granted the government's request.[3]

A superseding indictment was returned in January 1983. In addition to realleging the seven marijuana counts, it also charged co-defendant Mitchell with two counts of filing false income tax returns. The government moved to seal the superseding indictment. Relying on the representations made at the time of the original indictment, the prosecutor stated that unless the superseding indictment was

---

[1] At the close of the government's case, the trial court granted petitioner's motion for judgment of acquittal as to three counts; the jury acquitted him on two other counts.

[2] The other defendants were Phillip Anthony, William Sharp, Jeff Blake, Robert Lowery Logan, Henry "Gene" Todd, and David Mitchell. Anthony, Sharp, Blake, Logan, and Todd entered guilty pleas to various counts of a superseding indictment. Mitchell was tried and acquitted on two tax counts contained in the superseding indictment; the drug charges against him were dismissed by the district court on collateral estoppel grounds.

[3] This statement of facts is taken from the government's brief in the court of appeals and from the opinion in *United States* v. *Mitchell*, 769 F.2d 1544 (11th Cir. 1985), certs. denied, No. 85-5746 (Jan. 13, 1986), and No. 85-6106 (Feb. 24, 1986), which involved related legal issues raised by five of petitioner's co-defendants.

sealed, the defendants might flee if they learned of the charges. The magistrate granted that motion as well.

Co-defendant Mitchell subsequently learned of the indictment, and on February 6, 1984, he surrendered to the authorities. Four other co-defendants also surrendered or were arrested, but petitioner and co-defendant Sharp remained fugitives.

The five co-defendants in custody filed a motion to dismiss the indictment, claiming, inter alia, that the statute of limitations as to the marijuana counts had expired while the indictment was sealed and that they had been denied their right to a speedy trial. Following an evidentiary hearing,[4] the magistrate recommended against dismissal. The district court, after holding a further hearing, dismissed the seven drug counts as to the five defendants.[5] It found that the government had made insufficient efforts to locate the defendants following the return of the indictments, and it held that prejudice should be presumed as a matter of law because the indictment had remained sealed beyond the limitations period.

The government appealed, and the court of appeals reversed and remanded for further proceedings. *United States* v. *Mitchell,* 769 F.2d 1544 (11th Cir. 1985), cert. denied, No. 85-5746 (Jan. 13, 1986) and No. 85-6106

---

[4] At the hearing, the prosecutor testified about why the government had asked that the indictments be sealed. A principal concern was that three of the defendants (Mitchell, Sharp, and petitioner) were likely to flee. The prosecutor noted that both petitioner and Mitchell had easy access to overseas travel and to cash resources that had been secreted outside the country. He detailed the government's efforts to locate the five co-defendants, but because petitioner and Sharp were still fugitives, he declined to reveal in open court the efforts the government had made to locate those two defendants.

[5] The court did not dismiss the two tax-related counts against Mitchell because the superseding indictment charging those counts had been unsealed within the relevant statute of limitations period.

(Feb. 24, 1986). The court found that the district court had erred in presuming prejudice simply because the statute of limitations had expired while the indictment was under seal. Without disturbing the district court's finding concerning the government's lack of good faith efforts to locate the defendants, the court of appeals held that the defendants were required to show actual prejudice as a result of the delay. 769 F.2d at 1547-1548.

2. In May 1985, while the government's appeal in *Mitchell* was pending, petitioner was arrested in Fort Lauderdale, Florida. He subsequently moved for dismissal of the indictment against him, claiming that the district court's earlier ruling involving his co-defendants applied equally to him.

At the hearing before the magistrate on petitioner's motion, the government presented evidence concerning the circumstances surrounding petitioner's arrest and the efforts the government had made to locate him while the indictment was under seal. That evidence revealed, inter alia, that when petitioner was arrested, he had in his possession numerous pieces of identification in the name "Lawrence W. Bishop," some of which contained petitioner's photograph, and that he also had an airline ticket and a boat owner's association card in the name "Wayne Bishop." In addition, in April or May 1984 petitioner told his girlfriend that (1) there was an indictment outstanding against him in Atlanta; (2) he did not want to surrender to the authorities because he wanted to avoid being fingerprinted or paying attorney's fees; (3) the authorities did not have much evidence against him; and (4) his co-defendants already had "gotten off."[6]

---

[6] The evidence also showed that the Drug Enforcement Administration was unable to pursue several conventional investigative techniques to locate petitioner because it did not have his date of birth, social security number, or other specific biographical data. Moreover, the DEA made other efforts to locate petitioner, such as contacting

3. The court of appeals rendered its decision in *Mitchell* before the magistrate had issued his recommendation in the present case. In light of court's remand in *Mitchell,* the magistrate referred petitioner's motion to dismiss to the district court for resolution.

At a hearing before the district court, petitioner presented evidence on the prejudice he allegedly suffered because of the delay in his trial.[7] He claimed, among other things, that while the indictment was under seal, he destroyed various business and travel records that would have shown that he was not in the places where the offenses were alleged to have occurred on the dates set forth in the indictment (Pet. App. 8a-9a).

Following petitioner's conviction, the district court denied his motion to dismiss the indictment (Pet. App. 4a-11a). It held that petitioner had not satisfied his burden of showing " 'substantial, irreparable, actual prejudice' because of the sealing of the indictment" (*id.* at 11a). According to the court, there was no way of knowing whether the destroyed documents could have placed petitioner somewhere other than the locations alleged in the indictment, and it was therefore "highly questionable" whether the documents would have helped him (*id.* at 10a). The court pointed out that there were "no tax returns or credit card statements or other items that might independently corroborate" petitioner's assertions concerning the destroyed documents (*ibid.*). Moreover, the court

---

police departments in various states, speaking with informants, and tracking down various prior employment positions held by petitioner. All such attempts were unsuccessful, however, until the tip from petitioner's girlfriend led the DEA to petitioner in Fort Lauderdale.

[7] Petitioner's co-defendants refused to present any testimony on the issue of prejudice; the district court therefore denied their motions to dismiss.

noted (*id.* at 10a-11a) that the factual issues of whether the documents would have helped petitioner and whether he would have saved them had the indictment not been sealed turned largely upon his credibility, which had been successfully impeached by the government.

The court of appeals affirmed without opinion (Pet. App. 1a) and later denied rehearing en banc (*id.* at 2a-3a).

ARGUMENT

Petitioner contends (Pet. 10-25) that because the statute of limitations expired while his indictment was under seal, he should not have been required to show substantial, actual prejudice in order to prevail on his motion to dismiss. Petitioner does not contend that the decision below conflicts with any decision of this Court or of any other court of appeals. Rather, he argues that the standard adopted by the courts that have addressed the issue is erroneous. Contrary to petitioner's contention, however, the courts have adopted the correct standard. Review by this Court is therefore not warranted.

Under Fed. R. Crim. P. 6(e)(4), the government may request the sealing of an indictment for a period that extends beyond the statute of limitations. See, *e.g.*, *United States* v. *Ramey*, 791 F.2d 317, 320-321 (4th Cir. 1986); *United States* v. *Edwards*, 777 F.2d 644, 647-648 (11th Cir. 1985), cert. denied, No. 85-1562 (Apr. 21, 1986). An indictment sealed pursuant to Rule 6(e)(4) is timely even though the defendant is not arrested and the indictment is not made public until after the end of the limitations period. See, *e.g.*, *Edwards*, 777 F.2d at 647 (citing cases).

The courts have repeatedly held that when the prosecution establishes a legitimate need for sealing an indictment, and the indictment remains sealed beyond the limitations period, the defendant is not entitled to dismissal absent a showing of actual and substantial prejudice from the delay.

See, *e.g.*, *United States* v. *Srulowitz,* No. 86-1446 (2d Cir. May 15, 1987), slip op. 3020; *Ramey,* 791 F.2d at 322; *Edwards,* 777 F.2d at 649; *United States* v. *Southland Corp.,* 760 F.2d 1366, 1378-1381 (2d Cir. 1985), cert. denied, No. 84-1951 (Oct. 7, 1985); *United States* v. *Muse,* 633 F.2d 1041, 1043 (2d Cir. 1980), cert. denied, 450 U.S. 984 (1981); see also 8 J. Moore, *Federal Practice* ¶ 6.02[2][d], at 6-40 to 6-40.1 & n.55 (2d ed. 1987); 1 C. Wright, *Federal Practice and Procedure* § 110, at 306-307 & n.30 (2d ed. 1982). This standard provides relief for a defendant who has been harmed by the delay but otherwise enables the government to obtain sealed indictments without fear of later dismissal. See generally *Southland,* 760 F.2d at 1380.[8]

Notwithstanding these authorities, petitioner relies on cases holding that arrest warrants and parole violator warrants must be executed in a timely fashion and argues (Pet. 19-20) that if the government delays unreasonably in unsealing an indictment, the indictment should be dismissed even if the defendant has not suffered prejudice. Petitioner's argument lacks merit as it virtually ignores the important government interests at stake.

A major purpose of sealing indictments is to prevent defendants "from securing an unwarranted benefit from the statute of limitations by continuing to avoid arrest until the limitations period ha[s] run." *Muse,* 633 F.2d at 1043. If this objective is to be carried out, "[t]he Government should be able, except in the most extraordinary cases, to rely on [the] decision [of a magistrate to seal an

---

[8] Petitioner errs in contending (Pet. 11) that this standard results in "an abdication of [the] judicial function to the prosecuting attorney." Only a judicial officer can order the sealing of an indictment. Moreover, the court can later order dismissal of the indictment if it determines that the sealing beyond the statute of limitations period has resulted in actual prejudice to the defendant.

indictment] rather than risk dismissal * * * at a time when reindictment is by hypothesis impossible." *Southland,* 760 F.2d at 1380. Accordingly, the courts have correctly recognized that "the defendant's interests are adequately protected by permitting him to secure dismissal only when he can show prejudice * * *." *Muse,* 633 F.2d at 1043.

In any event, petitioner cannot prevail even under his own proposed standard.[9] At the hearing on petitioner's motion to dismiss, the magistrate heard testimony concerning the steps the government had taken to locate and apprehend petitioner. According to that testimony, the government received various leads concerning petitioner's whereabouts, but normal investigative channels were foreclosed because the government did not have petitioner's date of birth, social security number, or other personal data. When petitioner was ultimately located, he had in his possession numerous false identification documents. Moreover, petitioner confirmed in his statements to his girlfriend that he was seeking to avoid arrest on the present charges. Under these circumstances, it is clear that the continued sealing of the indictment was justified by petitioner's own efforts to evade apprehension.[10]

---

[9] The district court's finding in the co-defendants' case that the government did not make a good faith effort to locate the defendants while the indictment was under seal is not binding with regard to petitioner. At the hearing on those motions, to which petitioner was not a party, the co-defendants testified concerning their whereabouts during the period in question, showing that they could easily have been found and arrested. By contrast, petitioner and Sharp remained fugitives at that time; in addition, during the hearing on the co-defendants' dismissal motions, the government explained that it could not describe in open court the details of its attempts to apprehend petitioner, since to do so would jeopardize its arrest efforts.

[10] Petitioner contends (Pet. 21) that the only reason presented to the magistrate in support of the government's motion to seal the indictment was the need to assure the arrest of co-defendant Mitchell, and that following Mitchell's arrest, there was no further justification for

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
DEBORAH WATSON
Attorney

JUNE 1987

---

keeping the indictment under seal. That claim is erroneous; the prosecutor, in requesting that the superseding indictment be placed under seal, indicated that the defendants—not just Mitchell—might flee. Moreover, during the hearings on the co-defendants' motion to dismiss, the prosecutor testified that the government had sought the sealing of the indictment because of its concern that Mitchell, Sharp, and petitioner would flee unless they were arrested simultaneously. In light of petitioner's possession of false identification documents and his statements to his girlfriend that he was evading arrest, the government's concerns turned out to be fully justified.

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40395

No. 86-1570

Supreme Court, U.S.
FILED
JUL 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE McKINLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To the United States Court Of Appeals
For the Eleventh Circuit

PETITIONER'S REPLY BRIEF

James K. Jenkins
Maloy, Sadow & Jenkins
800 Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-9400

Counsel of Record
for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....i

ARGUMENT.....1

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases Page

Aguilar v. Texas,
378 U.S. 410 (1969).....14

United States v. Edwards,
777 F.2d 644 (11th Cir. 1985).....11

United States v. Mitchell,
769 F.2d 1544 (11th Cir. 1985)....13

United States v. Southland Corp.,
760 F.2d 1366 (2d Cir. 1985).....11

Statutes and Rules

Federal Rules of Criminal Procedure,
Rule 6(e)(4).....10, 11, 14, 15

ARGUMENT

1. Basis for Motion to Seal Limited to Co-defendant Mitchell

On page three and in footnote ten in the Brief for the United States in Opposition, the Government inaccurately states that the superseding indictment was sealed based upon the prosecutor's representations to the Magistrate that all defendants might flee. The only factual basis for sealing either of the indictments was Assistant United States Attorney Deichert's oral testimony given on October 19, 1982, before United States Magistrate Feldman. Mr. Deichert referred only to the possibility that defendant David Mitchell might flee (1SR2). In his testimony, Mr. Deichert never mentions any defendant other than Mitchell by name.

It is clear that at the time the indictments were sealed, the only factual

basis given for secrecy was the necessity to apprehend Mitchell. It was on that basis only that the sealing order could validly have been issued. Further, it was only on that basis that the Government could, in good faith have continued to allow the indictment to remain sealed. The facts surrounding the Government's locating Mitchell, his arrest, the lack of further need for sealing are detailed in the Petition for Certiorari, pages four through seven.

2. Efforts to Locate Petitioner

On pages four and eight and in footnotes six and nine of the Government's Brief in Opposition, attempts are made to justify the Government's inadequate efforts to locate the Petitioner. The Government's position that substantial efforts were made is not supported by the record in the case. The

Government freely admits in footnote six that the Drug Enforcement Administration lacked very basic facts about the Petitioner which with their technology and basic common sense could easily have been obtained.

For example, the case agent never bothered to obtain driver's license pictures for any of the Lawrence McKinleys in the Atlanta area from the State of Georgia. If he had done so, he could have shown them to his star witness Glenna Mitchell who could easily have identified Petitioner (R2-103-104). The license, of course, would have furnished a date of birth and legal residence. Further, the agent testified he would probably not have bothered McKinley's mother, even had he known where she lived (an inquiry he apparently carefully avoided making) (R2-67).

Finally, the Government apparently

never even bothered to investigate the telephone numbers Glenna Mitchell had for McKinley and his brothers to see if more information could be gleaned about him from that source (R7-181-184) (Cf. R7-95-98; R8-122-123).

Further, the case agent did not bother to check McKinley through the so-called EPIC system (R2-73-74). Although he put McKinley into NADDIS, he did not put him into TECS (Custom's computer), primarily because he has had some bad experiences with Customs and felt he did not have sufficient information that would allow TECS to accept the entry (R2-54-57; 91-110; 113). However, a Customs agent testified that the latter assumption was incorrect (R2-87, et seq.). The failure to place Petitioner in TECS is extremely significant, as he cleared the United States Customs numerous times between the indictment and

his arrest (R2-58), using a passport with his address on it (R2-72). Therefore, while a TECS entry without a birthdate and/or social security number would not have resulted in McKinley's arrest by Customs, it would have caused them to notify the DEA of his entry into the country with an Atlanta area address, and they could then have gotten a copy of the passport picture to show to Glenna Shipman.

It is respectfully submitted that the efforts on the part of the Government to locate Petitioner were at best skeletal and were certainly not substantial, diligent nor in good faith. Therefore, the continued sealing past the statute of limitations was in no way proper.

3. Petitioner was Never a Fugitive

On pages three, four, eight and in footnotes four, nine, ten of the Brief in

Opposition, the Government claims that McKinley was a fugitive during the entire period between the indictment and his arrest. At the outset it must be noted it is a logical and semantical impossibility for Petitioner to have been a "fugitive" during the first sixteen months of this period, as the indictment was sealed during that time. Simply stated, one can hardly flee from charges of which one is unaware.

Of primary importance is the fact that Petitioner does not complain about the Government's actions after the unsealing of the indictment. Nothing which occurred during the period after the unsealing has any relevance to the issues contained in this Petition. Witness Bukky, McKinley's estranged girlfriend, gave information only as to the period after the indictment was unsealed. Therefore, her entire testimony is of no rele-

vance for purposes of this Petition as it in no way proves Mr. McKinley was a "fugitive" during the sixteen months the charges were concealed from the world. Moreover, nowhere in its decision did the district court rely on Bukky's testimony (Appendix 4a-11a), nor did the Government rely on it in its briefs to the district court. It is inappropriate for the Government to ask this Court to do so now.

Before this Court can base any decision in Petitioner's case on Bukky's testimony, it is respectfully submitted that a review of her testimony demonstrates why neither the district court nor the Government in its submissions to that court relied on it: her testimony is so inherently incredible as to be totally unworthy of belief. For example:

(a) Bukky's claim that McKinley told her in March or April, 1984 that he was

aware of the indictment (relied upon by the Government at page 4, 6, 8 and 9 of its Brief) is utterly incredible because she also claims he told her at that time that the charges had already been dismissed as to the other defendants. The district court's order dismissing the indictment as to the other defendants (1 SR 1-3) was not entered until June 8, 1984, some months later.

(b) Prior to any reliance being put on Bukky's mental stability and credibility, her entire testimony must be reviewed (R3-87-143). For example, her testimony includes such claims as:

(1) "I found the truth. The Lord led me to the truth. He always does." The Lord led her to the truth about Larry McKinley: "Every lie that he told me, yes, he did." R3-15).

(2) She received "a vision" from the Lord about Larry McKinley's go-

ing to a "naked bar." (R3-106) (R3-111).

(3) She has "been chosen by God to be his vessel": "Yes, I believe that God chooses persons, places and things just like Satan does. Just like the negative forces. There's two forces on the planet, negative and positive." (R3-115).

(4) She believes that she is "The Queen of the Realm." (R3-117) (R3-134).

(5) She lists her return mailing address on her correspondence as "Christians Beloved Hearts, One Lord Jesus, Golden Gates Heaven" (R3-128).

(6) She was engaged to Lee Majors, "The Six Million Dollar Man" but could not marry him because Petitioner McKinley allegedly gave her venereal disease. (R3-135).

The Government's suggestion that this Court give credence to this witness'

testimony demonstrates the weakness of their true reasons for the Rule 6(e)(4) sealing.

4. No Testimony in Record as to Petitioner's Having Hidden Cash

In footnote four of the Brief in Opposition, the Government states: "The prosecutor noted that both Petitioner and Mitchell had easy access to overseas travel and to cash resources that had been secreted outside the country." A review of the record establishes that nowhere does it contain specific information that Petitioner had such resources secreted outside the country. The only testimony that alludes to these facts is in the ex post facto testimony of the prosecutor, which broadly alleged that all of the defendants, but particularly Mitchell, had such resources. Mr. Deichert never specified any basis for his allegations.

5. Essential Protections Afforded by Rule 6(e)(4)

The Government in its argument neglects the fact that the procedures governing the sealing of an indictment afford a defendant two essential protections in addition to the requirement that the sealing be to fulfill a legitimate prosecutorial need. First, the sealing must be in judicial rather than prosecutorial hands. United States v. Southland Corp., 760 F.2d 1366 (2d Cir. 1985). Second, the Government may not request that the sealing of an indictment extend past the expiration of the statute of limitations for more than a reasonable time. United States v. Edwards, 777 F.2d 644 (11th Cir. 1985).

All of the limitations that are placed on sealing of indictments mentioned herein serve to protect Rule 6(e)(4) sealings from prosecutorial

exploitation and a defendant from a stale prosecution. In the instant case all the protective limitations were ignored and hence, violated. First, the indictment remained sealed for seven months past the stated legitimate need for sealing -- the arrest of Mitchell. (Supp.R. Vol. 2, pp. 3-7). Second, the arrest of Mitchell was not communicated to the sealing magistrate. No steps were taken at that time by the Government to obtain authorization for the continued sealing. By these actions, the prosecution essentially placed continued sealing under their control and not that of the magistrate. Further, the indictment was unsealed seven months after Mitchell's arrest only because of the voluntary mass surrender of five of the defendants (R.Vol.1).

Throughout its Brief, the Government contends McKinley was a fugitive. The record does not support this contention.

On page eight of its Brief, the Government states their belief that McKinley was "evading apprehension" because he had false identification documents in his possession when he was located. This fact alone, the Government goes on to reason, justified the need for the sealing past the statute of limitations.

The Government's position is clearly without merit as it is an after the fact attempt to absolve themselves of the lack of good faith and diligent efforts to locate the Petitioner as the district court found in its original order as to Petitioner's co-defendants. See, United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985). The Government found the false identification at the time of McKinley's arrest, did not know of it at the time of the sealing, and hence was unable to communicate these facts to the sealing magistrate. Assuming arguendo that McKin-

ley was deemed a fugitive because of the false identification, these facts were not known or used to justify the sealing order. The Government cannot justify a sealing order after the fact just as it is prevented from gathering the facts for justification of a search and seizure after it has been carried out. See, Aguilar v. Texas, 378 U.S. 410, 413, fn. 3 (1969).

6. The Prejudice Requirement

On pages six through nine in its Brief in Opposition, the Government argues that Petitioner must show substantial and actual prejudice in order to prevail on the motion to dismiss. The detailed reasons stated in the Petition for Writ of Certiorari demonstrate that this standard is all but impossible to meet. The standard effectively denies an aggrieved defendant any protection

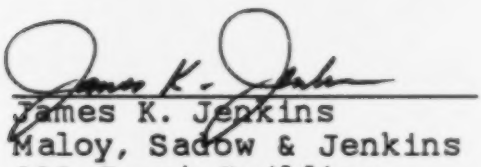
against or redress from stale prosecutions and negligent or willful violations of Rule 6(e)(4) sealing orders. In addition, this standard destroys the other essential limitations which are at the heart of the Rule 6(e)(4) procedures.

It is imperative that this Court lend guidance in the area of administration and use of Rule 6(e)(4) to seal indictments, especially when the period of sealing extends past the applicable statute of limitations. Careful consideration is needed to address the devastating effects the actual prejudice requirement has not only on the rights of this Petitioner, but in halting the continued misuse and misconduct committed in this area.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for certiorari should be granted.

Respectfully submitted,



James K. Jenkins
Maloy, Sadow & Jenkins
800 Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-9400

Counsel of Record
for Petitioner

July 16, 1987